

Ridhany (Migration) [2019] AATA 5564 (13 December 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Silvia Ridhany

CASE NUMBER: 1710996

DIBP REFERENCE(S): BCC2016/1526782 CLF2011/30531

MEMBER: Christine Kannis

DATE: 13 December 2019

PLACE OF DECISION: Perth

DECISION: The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 801 (Spouse) visa.

Statement made on 13 December 2019 at
2:55pm

CATCHWORDS

MIGRATION – cancellation – Partner (Residence) (Class BS) visa – Subclass 801 (Spouse) – change of circumstances – short-term extra-marital sexual relationship and pregnancy – initial commitment to marriage – later separation reported to department – no non-compliance – departmental officer did not hold delegated power to cancel visa – tribunal's power to review cancellation made without necessary delegation – decision under review set aside

1.

2. LEGISLATION

Migration Act 1958 (Cth), ss 90, 104, 107, 109(1)

CASE

Cao v MIAC [2007] FMCA 225

MHA v CSH18 [2019] FCAFC 80

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Immigration on 19 May 2017 to cancel the applicant's Subclass 801 visa under s.109(1) of the *Migration Act 1958* (the Act).
4. The delegate cancelled the visa on the basis that the applicant did not inform the Department of a change in her circumstances. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
5. The applicant is a national of Indonesia. She was granted a Subclass 801 visa on 14 May 2013. On 11 July 2013 the applicant advised the Department that she and her sponsor, Mr Avison Ket Tet Liew, had separated.
6. The applicant appeared before the Tribunal on 18 November 2019 to give evidence and present arguments.
7. The applicant was represented in relation to the review by her registered migration agent. Her representative did not attend the hearing.
8. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be set aside.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. Legislation

10. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
11. Relevantly to this matter, s.104 says:

Changes in circumstances to be notified

- (1) If circumstances change so that an answer to a question on a non-citizen's application form or an answer under this section is incorrect in the new circumstances, he or she must, as soon as practicable, inform an officer in writing of the new circumstances and of the correct answer in them.
- (2) If the applicant is in Australia at the time the visa is granted, subsection (1) only applies to changes in circumstance before the visa is granted.
- (3) If the applicant is outside Australia at the time the visa is granted, subsection (1) only applies to changes in circumstances after the application and before the applicant is immigration cleared.
- (4) Subsection (1) applies despite the grant of any visa.

12. Section 99 of the Act provides that any information a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment Authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of s.100, paragraphs 101(b) and 102(b) and ss. 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.
13. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s.107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.

14. **Background**

15. On 30 December 2014 Mr Han Shao lodged an application for a Subclass 309/100 visa with the applicant as the sponsor. In the application Mr Shao and the applicant claimed they were in a de facto relationship which had commenced on 2 June 2013.
16. The applicant and Mr Shao separated in April 2016.

Section 107 notice

17. In the present matter, the Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s.107 and that the Notice of Intention to Consider Cancellation (NOICC) dated 7 April 2017 issued under s.107 complied with the statutory requirements.
18. The non-compliance identified and particularised in the s.107 notice was non-compliance with s.104 in the following respects: the applicant did not inform the Department regarding changes to her circumstances pertaining to being in a relationship with a person other than her sponsor and being pregnant to that person, both of which made an answer/s to a question on her Partner visa application form incorrect in the new circumstances before the grant of the Subclass 801 visa on 14 May 2013.
19. The s.107 notice set out the following information to indicate non-compliance with section 104 of the Act.
20. On 28 February 2011 the applicant lodged a Combined Partner Subclass 820/801 visa application, sponsored by her Australian citizen husband in which she provided the following answers:
 - At question 42 when asked her fiancé's or partner's full name she responded "Avison Ket Tet Liew".
 - At question 71 when asked if she and her fiancé or partner intend to maintain a lasting relationship she answered "Yes"
 - At question 77 when asked has the relationship ceased she answered "No".
21. The s.107 notice stated:
 22. *You did not contact the Department to advise of your change in circumstances where you entered a close relationship with Mr Shao in February 2013 or when you realised you were pregnant with his child in April 2013, or indeed prior to*

that when you began to experience issues including family violence in the relationship. I therefore consider you have not complied with section 104 of the Act in not advising the Department of these changes in circumstances which led to the above answers in your Partner visa application becoming incorrect.

23. At question 96 of her visa application the applicant undertook to advise the Department of any changes to her personal circumstances while the application was being processed, including her permanent residence application. She also undertook to inform the Department if her relationship with Mr Liew broke down or ended in divorce, separation or death before the application was decided.
24. In addition to the non-compliance referred to in paragraphs 14 and 17 (above), the s.107 notice also said that answers provided by the applicant in a statutory declaration dated 7 December 2012 in which she stated that her relationship with Mr Liew was genuine and continuing and that she saw the relationship as lasting long term became incorrect in February 2013 when due to issues in her relationship with him she commenced a close relationship with Mr Han Shao and became pregnant with his child. The notice said that when she became aware in April 2013 that she was pregnant with Mr Shao's child she could not genuinely have considered her relationship with Mr Liew to last long term.
25. On 28 August 2013 Mr Shao lodged an application for a Subclass 600 Visitor visa in which he stated he wished to travel to Australia to visit his girlfriend, whom he identified as the applicant. He said she was pregnant and due to give birth in November 2013.
26. On 24 September 2013 the applicant participated in a phone interview and she was asked to provide a detailed account of her relationship with Mr Shao. She provided the following information:
 - She met Mr Shao, her then current partner, in November 2012 when she was still with Mr Liew. At that point they were just friends but she was having relationship problems with Mr Liew including domestic violence problems.
 - She and Mr Shao became very close in February 2013. Mr Liew was working away for long periods until he returned home in April 2013. She tried to make the relationship work. In April 2013 she found out she was pregnant to Mr Shao and at the end of May 2013 she and Mr Liew had a big fight and she told him she could not take it anymore and told him she was pregnant to Mr Shao.
27. The applicant gave birth to a child, Mikayla Shao, on 19 November 2013 and Mr Shao is stated to be the father of the child in the birth certificate.

28. Response to the s.107 notice

29. In response to the NOICC the applicant provided the following information in a statutory declaration dated 18 April 2017 :
 - She met Mr Liew at work and from 7 January 2010 to May 2013 they were in a genuine and continuing partner relationship. They married on 15 December 2010.
 - In or about September 2011 Mr Liew was posted for work to Canada for three months. In or about January 2012 he was transferred to Malaysia for six months and in or about July 2012 he was transferred to Turkmenistan where he worked four weeks on and two weeks off. They would spend the two weeks off together.

- Mr Liew's transfer to Turkmenistan placed a strain on their relationship because she wanted him to return to Australia and he wanted to stay and work there for financial reasons.
- In or about December 2012 Mr Liew was in Perth. They had a heated exchange and police were called. After this she went to Indonesia to visit her parents. They reconciled and he returned to Turkmenistan. In or about February 2013 Mr Liew ceased this work and returned to work in Perth.
- She met Mr Shao in November or December 2012 at work. One night she went out with Mr Shao and became intoxicated and had sex with him. The next day she told him they had done the wrong thing and that she still wanted to be with Mr Liew.
- Mr Shao is not her current boyfriend and except for one intimate incident, her relationship with him prior to the cessation of her marriage to Mr Liew was friendship only.
- In April 2013 she discovered she was pregnant with Mr Shao's child.
- Her daughter (Mr Shao's child) is an Australian citizen. She has been diagnosed with ventricular septal defect, a rare heart condition, which requires her to have ongoing medical specialist care at Princess Margaret Hospital in Perth. Indonesia does not have a medical system comparable to the medical system in Australia. The high cost of obtaining similar medical services in Indonesia means it is highly likely her daughter would not have access to the same specialist treatment she receives in Perth and this would place a vulnerable Australian citizen at considerable disadvantage.
- Her daughter has an ongoing relationship with her father, Mr Shao, in Australia.

30. The applicant provided the following information in a statutory declaration dated 1 May 2017:

- She has family members in Australia including a sister, aunt and uncle who live in Perth and she and her daughter catch up with her extended family every two weeks for a meal and sometimes they join her aunt for church services.
- Her daughter's heart condition is a compelling and compassionate ground to not cancel her visa. Medical reports were attached to the statutory declaration.

31. **Representative's submission provided prior to the hearing**

32. The applicant's representative provided a written submission dated 14 August 2017 which included the following:

- The delegate erred in finding the applicant no longer intended to maintain a lasting relationship with Mr Liew to the exclusion of all others in February 2013.
- The fact that the applicant subsequently sponsored Mr Shao does not suggest that her relationship with Mr Liew ceased before her Subclass 801 visa was granted in May 2013. Mr Shao's Partner visa application was lodged 19 months later, on 30 December 2014.
- If the applicant is required to leave Australia the decision would prejudice a vulnerable Australian citizen namely her daughter.

- The applicant is married and her husband is in full-time employment and committed to providing for the applicant and her daughter.
- The applicant maintains frequent contact with family members who live in Perth.

33. Evidence at hearing

34. The applicant's evidence at hearing was not materially different to the information she provided in her response to the s.107 notice. She and Mr Liew experienced problems in their relationship which she attributed to the difficulty of maintaining a long distance relationship. The applicant said she regretted having sex with Mr Shao in February 2013 and she told him she wanted to stay married to Mr Liew and make the marriage work. After that night in February 2013 she and Mr Shao only saw each other at work and did not spend time together socially.
35. The applicant explained that during the months Mr Liew worked overseas she had repeatedly asked him to return to Perth to live and work however he wanted to remain in his employment for financial reasons. In April 2013 he ceased his employment and returned to Perth. She said the reasons for his return were because his working overseas had caused problems in their marriage and also because she had previously told him she was pregnant. She said based on advice from her doctor in Indonesia she had at one time believed she was pregnant with Mr Liew's child. However in April 2013 her doctor in Australia confirmed the date of conception at which time she knew she was pregnant with Mr Shao's child.
36. The applicant told the Tribunal that when she discovered she was pregnant with Mr Shao's child she became depressed and scared. She didn't know what to do but she wanted to have a good marriage with Mr Liew and believed she had to be honest with him. In late May 2013 she told him she was pregnant with Mr Shao's child and hoped he would agree to raise the child with her. However he became very angry with her and refused to consider it. She left the house and waited for him to calm down before returning in June 2013 to try and discuss the possibility of staying married and raising the child together. He was not agreeable.

37. Was there non-compliance as described in the s.107 notice?

38. The Tribunal considered the applicant's sexual relationship with Mr Shao. The applicant's evidence was that despite having sex with Mr Shao in February 2013 she was in a genuine and continuing relationship with Mr Liew and their relationship had not ceased at that time.
39. Sexual infidelity by one of the parties to the relationship does not necessarily take the relationship outside the definition of spouse or de facto. In *Cao v MIAC* [2007] FMCA 225 Riley FM at [36] and [42] said:

40. *In my view, the correct interpretation of the relevant regulations is that it is a matter of fact and degree in the circumstances of the particular case whether an extra-marital sexual encounter indicates a lack of the required commitment to a shared life as husband and wife to the exclusion of all others. The regulations mean that a person is not a spouse as defined if he or she is party to another marriage-like relationship. Sex is only one part of such relationships and is obviously not unique to such relationships. Sex does not, of itself, mean that the relationship in which it occurs is a marriage-like relationship. The regulations do not exclude a person from being a spouse as defined if he or she engages in an extra-marital sexual encounter, provided that it is not in the context of a second marriage-like relationship and provided that he or she continues to have a commitment to a shared life as husband and wife with his or her spouse.*

41. *It is a matter of common knowledge that there are people who remain in their marriages for 20 or 30 years or more but who nevertheless during that time have numerous, short term, extramarital sexual encounters involving no significant emotional investment. It is also a matter of common knowledge that, sometimes, a person has an extramarital affair which ends after a time and the marriage continues. In other cases, a person who has an extramarital affair eventually leaves the marriage and goes on to build a new life as husband and wife with the person with whom he or she had the affair. In such cases, there is obviously a point where the commitment to the first marriage ends. It is a matter for the Tribunal as the finder of fact to determine in all of the circumstances of the particular case whether or not an extramarital sexual encounter of one of the parties to a marriage reflects a lack of commitment to a shared life as husband and wife with the other party to the marriage, and whether or not it reflects the formation of a second marriage-like relationship.*

42. In the present case the applicant said, and the Tribunal accepts, that prior to the cessation of her marriage to Mr Liew in late May 2013, her relationship with Mr Shao was friendship only and that they had one sexual encounter.
43. The delegate said when in April 2013 the applicant became aware that she was pregnant with Mr Shao's child it is reasonable to assume that she knew the relationship with Mr Liew was effectively over. The Tribunal does not agree with this assumption and finds that at the time the applicant's Subclass 801 visa was granted on 14 May 2013 she was the spouse of Mr Liew. The Tribunal finds that the applicant's relationship with Mr Liew ceased in late May 2013.
44. For these reasons, the Tribunal finds that there was no non-compliance by the applicant in the way described in the s.107 notice. It follows that the discretionary power to cancel the applicant's visa does not arise.

45. **Delegation**

46. The Tribunal was notified by the Department that the officer who made the decision to cancel the applicant's visa did not have the delegated power to cancel visas under s.109 at the time the decision was made.
47. In *MHA v CSH18* [2019] FCAFC 80, the Full Federal Court considered an appeal from *CSH18 v MHA* [2018] FCCA 3226, which considered the Tribunal's powers on review of a purported cancellation made without the necessary delegation. The Full Court confirmed at [57] that the Tribunal had jurisdiction to review the decision. At [88], it held that the Federal Circuit Court erred in finding that the only power of the Tribunal was to set aside the decision. Following the Full Court judgment, there is no question that the Tribunal has power to set aside one of these purported s.109 cancellations, where the ground of cancellation is not made out.

DECISION

48. The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 801 (Spouse) visa.

Christine Kannis
Member

ATTACHMENT – *Migration Act 1958* (extracts)

5 Interpretation

- (1) In this Act, unless the contrary intention appears:
- bogus document***, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly.

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: ***Bogus document*** is defined in subsection 5(1).

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

104 Changes in circumstances to be notified

- (1) If circumstances change so that an answer to a question on a non-citizen's application form or an answer under this section is incorrect in the new circumstances, he or she must, as soon as practicable, inform an officer in writing of the new circumstances and of the correct answer in them.
- (2) If the applicant is in Australia at the time the visa is granted, subsection (1) only applies to changes in circumstance before the visa is granted.
- (3) If the applicant is outside Australia at the time the visa is granted, subsection (1) only applies to changes in circumstances after the application and before the applicant is immigration cleared.
- (4) Subsection (1) applies despite the grant of any visa.

107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:
 - (a) giving particulars of the possible non-compliance; and
 - (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
 - (i) if the holder disputes that there was non-compliance:
 - (A) shows that there was compliance; and
 - (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or

- (ii) if the holder accepts that there was non-compliance:
 - (A) give reasons for the non-compliance; and
 - (B) shows cause why the visa should not be cancelled; and
- (c) stating that the Minister will consider cancelling the visa:
 - (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
 - (ii) if the holder gives the Minister a written response within that period—when the response is given; or
 - (iii) otherwise—at the end of that period; and
- (d) setting out the effect of sections 108, 109, 111 and 112; and
- (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
- (f) requiring the holder:
 - (i) to tell the Minister the address at which the holder is living; and
 - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
 - (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
 - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
 - (a) visas of a stated class; or
 - (b) visa holders in stated circumstances; or
 - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
 - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

108 Decision about non-compliance

The Minister is to:

- (a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and
- (b) decide whether there was non-compliance by the visa holder in the way described in the notice.

109 Cancellation of visa if information incorrect

- (1) The Minister, after:
 - (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
 - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
 - (c) having regard to any prescribed circumstances;
 may cancel the visa.
- (2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled.